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Citation for published version:
Canevaro, M 2018, Law and justice. in G Martin (ed.), *The Oxford Handbook of Demosthenes.* Oxford Handbooks, Oxford University Press, Oxford, pp. 73-85.

Link:
Link to publication record in Edinburgh Research Explorer

Document Version:
Peer reviewed version

Published In:
The Oxford Handbook of Demosthenes

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Download date: 05. May. 2023

Law and Justice

Oxford Handbook of Demosthenes

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Introduction

The Demosthenic *corpus* contains 42 judicial speeches (some by Demosthenes and some by other orators). In these speeches issues of justice are central, and legal cases are assessed for their conformity with the laws of Athens. The role of the laws and of justice in the oratory of Demosthenes, in connection with the judges' expectations and with the rules and institutional habits that determined how these cases were assessed, will be the topic of this chapter (the next chapter **REF Gagarin** will discuss instead litigants' strategies in bringing a case to court their choice of procedure).

I shall not make a distinction between the speeches written by Demosthenes himself and those written by others, referring occasionally also to speeches from other *corpora*. Although it is undeniable that Demosthenes must have had his own personal political and ideological outlook, the discourse of law and justice in the speeches of the orators is overwhelmingly conditioned by the institutional context of the Athenian lawcourts and by the expectations of the judges. Because the ultimate aim of a speaker was to convince the judges to cast their vote for him, no orator would risk presenting arguments significantly at odds with what the judges had come to expect from a litigant. This is why there is no detectable difference between the legal strategies used by Demosthenes and for instance those of his main political adversary Aeschines. And this is also why it is immaterial here whether a particular speech was written to be pronounced by Demosthenes himself, or on commission. Demosthenes' speeches are the main evidence for the discourse of law and justice current in the Athenian lawcourts. They are not evidence of a distinctive Demosthenic approach to issues of law and justice.

The place of law and justice in the Athenian trial

The 6,000 Athenians selected every year to serve in the lawcourts had to swear the Judicial Oath (for references cf. Harris 2013: 351-6; Dem. 24.149-51 purports to be the text of the oath, but it is a later pastiche: see Canevaro 2013a: 173-80). The clause most often referred to by the orators prescribes that the judges should vote in accordance with the laws (a few times 'the laws and decrees') of the Athenians. This

clause is evidence that the judges' main task was to decide whether the facts at stake in a particular case constituted a breach of the laws of the city.

In four passages (Dem. 20.118, 39.39-40, 23.96-7, 57.63; cf. also Arist. *Pol*. 1287a26), however, we find references to a provision that the judges follow their 'most just judgement' (*gnômê dikaiotatê*). This has been interpreted (e.g. by Todd 1993: 54; Christ 1998: 201-3; Lanni 2006: 72) as providing an alternative standard of judgement (justice as an alternative to the laws), yet two passages add the specification 'about matters for which there are no laws' (Dem. 20.118 and 39.39-40, confirmed by Pollux 8.122 and backed by parallels from other cities: *SEG* 27:261.26-30, RO 83 iii.9-17; cf. Harris 2013: 104-5). Hence the *gnomê dikaiotatê* is not an alternative standard of judgement (in spite of Arist. *Rhet.* 1.15.1375a5-b12; cf. Carey 1996: 39, Johnstone 1999: 41 and Harris 2013: 105-9). Rather, the authority of the laws is paramount, and the *gnômê dikaiotatê* comes into play only when the guidance offered by the laws is less than unequivocal (cf. Harris 2013: 104-14). Judging from the very few mentions of the clause about the *gnomê dikaiotatê*, this happened very rarely (cf. Johnstone 1999: 41 and Harris 2013: 114).

In fact, far from being a standard of judgement alternative to the laws, justice is always mentioned by the orators virtually as a synonym of lawfulness. A good example is Dem. 43.52, where the speaker states: 'This is what the law states, and this is what is just' (also e.g. Dem. 43.34, 60, 84; 46.28; [Arist.] *Ath. Pol.* 55.5). Accordingly, the discourses of law and of justice in the orators are one and the same: judges were expected to uphold justice by casting their votes in accordance with the laws, and defendants and accusers had to prove that their case was just by showing that the acts under debate had or had not been in accordance with the laws (cf. Harris 2013: 111-14; Johnstone 1999: 40-2).

Despite the centrality attached to the laws by the orators and in the institutional ideology of the legal system, many scholars have noticed that the use of actual laws in the speeches of the orators appears sometimes idiosyncratic. A prominent case is *Against Conon* (Dem. 54): Demosthenes wrote it for Ariston, who had been assaulted in the Agora by Conon, his son, and some friends. They stripped his clothes and beat him almost to death, and while he lay on the ground they insulted him. Ariston brought a private charge for assault (a *dikê aikeias*; on the choice of procedure **REF Gagarin**). In the speech, Ariston has only two laws read out (§§24-5 on *hybris* and on clothes thieves), but not the one governing the *dikê aikeias*. There is

only a cursory reference to this law (§§17-19), together with other laws that are more or less irrelevant to the charge. Scholars, faced with this and similar passages, have stressed the difference between modern and ancient uses of the laws in the lawcourts. Todd (1993: 59) claims that the laws were not 'binding', but were pieces of evidence among many (also Cohen 1995: 178). Lanni (2006) argues that different courts had different standards of relevance, and that the courts were not interested in the consistency of their decisions, but rather aimed to provide *ad hoc* judgements, taking into account also the public service record of the defendant. Other scholars have recognized the importance of the laws to judges and litigants and the existence of a legal discourse founded specifically on the laws but have also stressed that this discourse was less about knowing the laws than about knowing 'how to make arguments about the law' (Johnstone 1999: 43). Unlawfulness was envisaged not, strictly, as breaking the letter of a particular law, but rather as behaviour in contradiction to the general spirit of the laws (cf. Johstone 1999: 21-45; Wohl 2010).

To be sure, we shall se that the orators did make general arguments about justice and lawfulness to construe their opponents' conduct as unlawful, and that arguments could be based on a variety of laws other than those underlying the specific charge. But the argument that the laws were not adduced as proof that the defendant had transgressed a specific statute has been overstated. Another pledge of the Judicial Oath bound the judges to vote about matters pertaining to the charge (Aeschin. 1.154, 170; Dem. 45.50), i.e. specifically on the matter as defined in the plaint presented in writing (on this see Faraguna 2009) to the magistrate when bringing the charge. The document contained, among others, the charges against the defendant, and the action that was being initiated. The plaintiff had to describe the defendant's culpable acts and explain how these constituted an offence, using the language of the statute whose provisions the defendant had infringed (e.g. Hyp. *Eux.* 29-30). If a plaint failed to do so (and therefore misrepresented the issue which was being brought before the judges), the magistrate could force the plaintiff to rephrase and include the relevant language (cf. Is. 10.2 and Lys. 13.85-7; in general on the plaint Thür 2008: 66-9 and particularly Harris 2013: 114-36).

Moreover, the plaint was read out to the judges at the beginning of the trial, to inform them about the exact matter on which they were supposed to express themselves (Aeschin. 1.2). Its contents determined what alone was relevant for the sentence (Rhodes 2004 and Lanni 2006: 114 use contextual criteria to determine

relevance, yet relevance was determined by the contents of the plaint). This goes a long way towards explaining why the litigants often do not bother having the actual law on which the charge is based read out: the judges had already heard the plaint – drawing on the wording of that law – at the beginning of the court proceedings. So reading and discussing extensively the relevant law was necessary only when there were disagreements regarding the meaning of the law, its correct interpretation, and its actual applicability in the present case (cf. **the next section**). But in most of the surviving cases, the dispute is about facts, not about the meaning of the law (cf. the list provided in Harris 2013: 381-6). In the trial against Conon, for instance, it is very clear what *aikeia* ('assault') means. What the plaintiff must demonstrate, and the defendant denies, is that Conon and his son struck the first blow. In cases such as this, the accuser and the defendant implicitly agree about the meaning of the statute underlying the charge. They disagree about whether the behaviour of the defendant qualified as a breach of that statute. We should not, therefore, expect invariably detailed discussions of legal technicalities in order for the discourse in the Athenian lawcourts to qualify as 'legal discourse'. Likewise, we should not overstate the 'rhetorical' nature of the orators' approach to the laws, simply because the orators often do not bother discussing extensively the key statute.

On the other hand, this does not mean that what mattered was always and exclusively the mechanical application of the letter of the relevant law (as argued e.g. by Meyer-Laurin 1965; Meinecke 1971). In fact, the Judicial Oath bound the judges to cast their vote 'in accordance with the laws and the decrees of the Athenians'. Not exclusively with a specific law, to the exclusion of all the others (cf. Harris 2013: 301). This may seem a trivial distinction, but in fact litigants do often appeal to a general principle of justice, which is however not extra-legal, but derived from all the laws of the city as a coherent whole, expressing a coherent view of right and wrong (this aspect of Athenian legal discourse is correctly stressed by Johstone 1999: 21-45 and Wohl 2011: 287-317). Such arguments, based on the overall rationality of the laws as a whole, were used both to clarify the meaning of a law when disputed (**see below**) and to argue against the strict application of a specific statute.

There is evidence that the courts could on occasion vote for acquittal against the letter of the relevant statute, if its mechanical application would produce an effect contrary to the overall spirit of the laws. For instance, in *Against Neaera* ([Dem.] 59.78-84), Apollodorus recalls the occasion in which his opponent, Stephanus, gave

the daughter of Neaera in marriage to Theogenes, then *basileus*. A law required that the wife of the *basileus* be an Athenian and a virgin at the time of marriage. Apparently, Neaera's daughter was neither. The Areopagus wanted to impose on Theogenes the highest fine possible, but relented when informed that he was not aware that his wife did not qualify, on the grounds of his naïveté and of having been deceived by Stephanus. This could be interpreted as an instance of a lawcourt making a decision based on extra-legal considerations, even though the Areopagus is often portrayed as a body that applies the law very strictly (e.g. Din. 1.58-9; cf. Lanni 2006 on their allegedly stricter standards of relevance). In fact, the principle on which the Areopagites based their decision – that Theogenes did not know he was breaking the law – is enshrined in several Athenian laws (cf. Harris 2013: 295-7), and [Dem.] 58.24 explicitly states, as a general principle, that those that break the law unwillingly because of inexperience should be pardoned (cf. *IG* I^3 4.6-7, 9-10; *IEleusis* 138.27-9; Dem. 21.42-5).

It is clear therefore that the decision of the Areopagus was not based on extra-legal considerations, on a higher principle of justice independent from the laws. It was based on a higher principle of justice that was extracted from, and explicitly recognized by, the laws. Taking into account such a principle meant voting in accordance with the laws against the mechanical application of a specific statute. We find in the orators various examples of appeals to such standards of judgement. For instance, *Against Androtion* (Dem. 22) bases its case on the principle, enshrined in the laws of the city, that an involuntary and inevitable infraction of a law must not be punished (cf. Harris 2013: 286-7).

Taking into account other legal considerations, also based on the laws, was usually called *epieikeia* ('fairness'), and Dem. 21.90 states that defendants should normally be entitled to it. Aristotle justifies the judicial practice of *epieikeia* (Arist. *Nic. Eth.* 5.10.1137a-38a and *Rhet.* 1.13.13-19. 1374a-b) as due to the fact that the lawgiver needs to formulate general rules but cannot take into account all possible situations. Therefore the laws fail to deal with exceptional cases, and must occasionally be corrected. The point is not that a law is unjust, but that it is formulated in general terms. When there are exceptions, the judges should take into account the intent of the lawgiver, that of the defendant and various extenuating circumstances (cf. Brunschwig 1996 and Harris 2013: 274-301; **see the next section**).

Whether the judges cast their vote on the basis of a mechanical application of a specific statute, or they apply *epieikeia*, litigants in court need invariably to argue their case on the basis of the laws of the city, and the judges must cast their vote in accordance with them, to dispense justice.

Using the law in the Athenian lawcourts

Laws, like all other kinds of evidence, could be presented to the judges in two ways. The speaker could simply refer to them, quoting them, paraphrasing them or summarizing them, or he could ask the secretary of the lawcourt (*grammateus*) to read out the actual statute and then discuss it afterwards (on the texts of the laws found as documents after some of these requests, which are mostly, but not invariably, later forgeries, see Canevaro 2013a). To have a law (or any other written evidence) read out by the *grammateus*, one needed to present it first at the preliminary hearings (**REF Gagarin**), and no other evidence was admissible in the main trial (for private cases cf. [Arist.] *Ath. Pol.* 53.2; for public cases cf. Thür 2008). After the hearings all evidence was sealed in an earthenware pot (*echinos*) that was opened in court, and in which the *grammateus* would find the documents to read out. Such rules secured a certain degree of fairness to the legal procedure: during the cross-examination at the preliminary hearing both parties would get a clear picture of the case of their opponents and of the evidence at their disposal. They could not be surprised in court by new (written) evidence and could check the accuracy of the documents provided by their opponents ahead of the trial.

Both practices had their advantages. Mentioning laws without having them read out (e.g. Dem. 54.17-19) allows a speaker to give the impression that his argument is based on the laws without need of detailed analysis. It also allows the litigant to be freer with his paraphrases, leaving more room for misrepresentation, suppression and even misquotation. The speaker can also surprise his opponent by discussing laws that have not been mentioned before. On the other hand, such mentions may have been less effective, in particular when detailed points of law were involved. The judges may have been aware, or may have been made aware by the opponent, that the litigant could have had the laws actually read out, but had chosen not to, becoming therefore suspicious.

The evidence of a written document reporting the text of a law, read out by the *grammateus*, would have carried more weight. The very act of asking the *grammateus*

to find the relevant document in the *echinos* (e.g. Dem. 21.94; 20.84), and then the wait for his reading to be finished, would have increased the authority of the law in question, underpinned the reliability of the text, and focused the attention of the judges. The fact that the law was read out by the *grammateus* would have provided one's argument with institutional validation, as if the laws of the city, through the reading of a public official, had rallied, like witnesses, to support the speaker. Such readings had strong persuasive power, and this is why their use was so heavily regulated.

On the other hand, although the speaker would still choose what documents should be in the *echinos* (as stressed by Gagarin 2008: 85-86), this particular use of the laws came with constraints. Because the law was read out by the *grammateus*, there was a limit to what the speaker could do with it. He could of course misinterpret it (deliberately or not), but deliberate misrepresentation and misquotation was an entirely different matter. Some scholars have assumed that the orators, even when the laws were read out by the *grammateus*, practiced a high degree of distortion of their contents (e.g. Kapparis 1995: 387; Pelling 2000: 65–7). Careful analysis of the orators' paraphrases after they ask the *grammateus* to read out a law shows that this was not the case. One must first of all recognize that giving an untruthful account of events from long ago, or even a tendentious interpretation of a law, is not the same as misreporting a text that the judges have heard just a few seconds ago. The judges (who had considerable knowledge of the laws of the city and of their language and terminology, cf. Harris 2010: 1-7) would have almost certainly detected significant inconsistencies between the document read out and the speaker's paraphrase, so any important misrepresentation would have undermined the speaker's credibility (cf. Canevaro 2013a: 27-9).

This is not to say that the orators never misinterpreted (deliberately or not) the laws read out by the *grammateus*, nor that they never provided selective and deceitful quotations of real statutes (cf. Gagarin 2008: 191–2 and Rubinstein 2009: 121–3). For instance, when Andocides claims (1.88) that the statute 'nobody should use the laws that have been enacted before the archonship of Eucleides' means that only the laws and decrees passed after the archonship of Euclides are valid, he is misinterpreting the law to show that the decree of Isotidimes is no longer valid. The statute simply meant that only offences committed after the archonship of Euclides could still be

prosecuted (MacDowell 1962: 128-9, 137). And yet even while misinterpreting it, Andocides does not significantly misrepresent the letter of the statute.

As for selective quotation, this is precisely Demosthenes' accusation against Aeschines at 18.121: 'But you're not ashamed to bring suit out of envy rather than for an actual offense and to rewrite laws or snip off parts of them, even though citizens sworn to render judgment according to the laws should hear them in their entirety' (trans. Yunis). One should however distinguish between incomplete reading of the document by the *grammateus* (the speaker asks him to stop) and selective quotation by the orator in his paraphrase on the one hand, and selective transcription of the document itself on the other (postulated by Gagarin 2008: 192). The latter is unlikely (cf. Canevaro 2013a: 30 n. 63): because the document with the law was first presented at the preliminary hearings and then sealed, surely, if a litigant produced a selection that manipulated its meaning, the opponent would check the relevant law and produce a more complete transcription. But the former two options certainly happened: the orators sometimes ask the *grammateus* to stop reading (e.g. Dem. 20.96), and by stopping him at a precise point they could potentially alter the meaning of a law. This could however be rectified, and the deception exposed, by the opponent asking the *grammateus* to read the full text. Likewise, the orators sometimes quote selectively or add a key element in their paraphrases: for instance at Dem. 20.18, 26 Demosthenes claims that any exemption from the *eisphora* and the trierarchy is forbidden by the laws. This cannot be right, as we can read an honorary inscription that gives the Sidonians exemption from *eisphora* (*IG* II^2 141. 29–36). Demosthenes is here clearly misrepresenting the law. But it should be noted that closer to the actual reading of the law by the *grammateus*, at Dem. 20.27, his paraphrase becomes more accurate, and the *eisphora* disappears (cf. Canevaro 2013a: 30). Even subtle misrepresentations like this can only be attempted at a safe distance from the reading of the document, to avoid detection (cf. also Dem. 23.44 with Canevaro 2013a: 29-30 and 58-62).

The orators take great pains to be careful and accurate in the vicinity of the readings, to avoid giving the impression of being liars. For this reason, the use of these strategies is very infrequent. Otherwise we would expect to find significant differences between paraphrases of the same statutes by different speakers in different contexts. In fact, whatever the rhetorical purposes of different (and even opposing) speakers, we find that paraphrases are generally very consistent among them (cf. Canevaro 2013a: 30-2 for several examples). And in the few cases in which we can

check the orators' paraphrases against inscriptions, they prove to be remarkably accurate (Dem. 20.41-5 and *IG* I^3 25; Dem. 23.37-8 and *IG* I^3 104.26-9; Dem. 23.60-1 and *IG* I^3 104.37–8; cf. Canevaro 2013a: 31-2).

Laws are mentioned and paraphrased (whether in passing, or after the *grammateus* has read them out) for various reasons. In many cases a law is discussed because it is the key statute on the basis of which the charge has been brought. Sometimes the key law is mentioned in passing, without further discussion, as at Dem. 54.17-19. The reason is usually that the case will be decided on matters of fact, and not of law. Sometimes, on the other hand, the key law is read out by the *grammateus*, before the discussion. This is for instance the case of the law on *hybris* at Dem. 21.47-50 (but the document is a forgery), which governs the *graphê hybreos* brought by Demosthenes against Meidias (cf. Harris 2008: 75-87).

Often, laws were read out by the *grammateus* and extensively discussed because the litigants did not agree on their interpretation and applicability to the present case. An example is Lys. 3 *Against Simon*, a case of 'wounding with intent' (*trauma ek pronoias*). The meaning of *pronoia* is clear enough: it means 'intention', 'purpose', 'awareness' of the likely results of one's actions (cf. Harris 2013: 182-6). But intention to do what? To hurt the victim? There was no question about that: the defendant struck Simon and wounded him. But it was far from clear whether his intention was to kill him. The defendant argues that what is needed to prove the charge is not just evidence of the intent to wound, but rather of the intent to kill (Phillips 2007: 83-8). It is quite clear that in such cases it was the interpretation of particular words or clauses that gave rise to the disagreement, and on which the case was built. Scholars, after Hart's definition, have described this as the 'open texture' of the law (cf. Harris 2013: 175-245). One reason to discuss a statute extensively was to exploit its open texture and argue that it should be interpreted in a way that supported the speaker's case.

But this was not the only reason for quoting and discussing a law in the lawcourts. Often, the quotation of a statute had the only purpose of underpinning a particular interpretation of another statute, the key one whose 'open texture' was being debated. An important example is Lysias' *Against Theomnestus* (Lys. 10). This case had been brought against Theomnestus for defamation (*kakêgoria*), for having stated in a previous trial that the speaker had killed his own father, which was patently not true – his father had been killed by the Thirty when the speaker was thirteen (Lys.

10.6-8, 11-12). Apparently, Theomnestus argued that the law on *kakêgoria* did not apply, because it said that it is not allowed to say that one is *androphonos* ('murderer'), not that 'he has killed someone'. The speaker countered that it is not the word itself that matters, but its meaning, and proved this by citing a series of laws with archaic vocabulary whose provisions are applied nevertheless. Laws are cited in such cases not because they govern the specific case, but to elucidate the applicability of the key law (Johnstone 1999: 24-5; cf. Hyp. *Ath.* 14-22 with Harris 2013: 202-5 for another example of this strategy). The rationale for using other laws to clarify the meaning of a particular statute is symptomatic of a particular view of the laws: the Athenians believed that the laws constituted a coherent and rational whole, and therefore no contradictions among them were possible, not even in the purpose they expressed. This was because the laws as a whole were seen as the work of an original lawgiver, often identified as Solon: they were the product of one legislative effort and of one rationality. Therefore other laws could be used to elucidate the meaning of a disputed statute (e.g. Dem. 21.56-7, 23.50, 44.57-8, 54.17-19), and sometimes the intent of the lawgiver could be guessed by the speaker from the text of the relevant law itself (e.g. Dem. 36.27, 58.11).

This view underpinned also other uses of the laws. It was at the basis of appeals to *epieikeia*: the principles brought against a strict application of a statute were derived from other statutes and from the overall spirit of the laws, which expressed the intent of the lawgiver (**see the preceding section**). On the other hand, in some cases, such as Demosthenes' *Against Conon* (Dem. 54.24-5), several laws were discussed to show that the actions of the defendant were liable not only under the key law of the charge, but under many laws. Ariston argues that while he has prosecuted Conon for assault, he could have prosecuted him also for *hybris* and as a clothes thief (see also Aeschin. 1.5-37 for this strategy). The impression that the orators strive to give is that the laws as a whole, the spirit of the laws, and the very intent of the lawgiver are against the defendant.

A further, connected, use of statutes is specific to public charges against illegal decrees (*graphê paranomôn*) and against enacting an inappropriate law (*graphê nomon mê epitêdeion theinai*). These charges could be brought by a volunteer prosecutor against the proponents of decrees and laws, and the judges had the power of judicial review, and could confirm or repeal the decree or the law (and punish the proposer, if the charge was brought within a year). Part of the case that the accuser

was expected to make was to show that a particular decree or law contradicted existing laws that had not been repealed beforehand as the law required. We find therefore detailed discussions of several statutes that contradict the provisions of the decree or law under scrutiny. The most striking case is Demosthenes' *Against Timocrates* (Dem. 24): at §39 the speaker has the law of Timocrates read out (which gives insolvent public debtors the chance not to go to prison if they can nominate a surety), and then asks the *grammateus* to read out seven contradictory laws. The strategy here is not just to point to specific literal contradictions, but to argue that the new law contradicts the spirit of the laws as a whole, the intent of the lawgiver as is expressed in them, and therefore, if not repealed, would cause the deterioration of the entire legal system (cf. Canevaro, forthcoming).

The coherence of the laws and the authority of the lawgiver

Whether the argument in a case rested on a specific law or on general legal principles, Demosthenes and the other orators always express their arguments in accordance with a specific set of ideological tenets that underpin the Athenian conception of the the origin and the nature of their laws. The existing laws of Athens (*keimenoi nomoi*) are mostly referred to in the plural (e.g. Dem. 20.8), to suggest an organic view of the legal system. The authority of the laws is often justified on the basis of their antiquity (e.g. Dem. 24.24, 33), and connected with the figure of the lawgiver, mostly identified with Solon (e.g. Aesch. 1.183, 3.175, Dem. 18.6, 24.103, 142; cf. Hansen 1989: 81). These basic ideological tenets underpin the frequent recourse to arguments from the intent of the lawgiver and to discussion of different laws. Because the laws are ancient, authoritative, and the product of the individual rationality of the lawgiver, they must be consistent among themselves and in the principles they foster (cf. Johstone 1999: 21-45, Wohl 2011: 287-317 and Canevaro, forthcoming).

The list of fourth-century institutions that are attributed to Solon is impressive and completely unrealistic (cf. Hansen 1989; *pace* Ruschenbusch 1966). Among many other things, Solon apparently instituted the *nomothesia* procedure (Dem. 20.90), lottery for public offices ([Arist.] *Ath. Pol.* 8.), and provided that officials should not be paid (Isoc. 7.24-25). This tendency to attribute to Solon all Athenian institutions reflects deep features of Athenian legal discourse. Some scholars have interpreted these references as evidence of a 'conservative' approach to the laws, a nostalgic search for legitimacy (cf. Hansen 1989; Thomas 1994; Wohl 2010: 287-301,

despite the differences of their approaches), but the importance of such views in fourth-century legal discourse has been overstated. Many of the passages that have seemed to support such views come in fact from speeches written for public charges against inappropriate laws (*graphê nomon mê epitedeion theinai*; cf. Canevaro 2013b, 2014 and 2016), where their purpose was repealing a law that had just been enacted (the only extant speeches for such charges are Dem. 20 and Dem. 24). One should not be surprised by arguments against legal change in a context in which the orator is arguing against a new law.

But even within these speeches, expressions of such 'conservative' views are far from unequivocal. One of the key passages that appear to paint a conservative picture of the Athenian attitudes to their laws is Dem. 20.91-92. Demosthenes is discussing the procedures of *nomothesia*, in a speech that attempts to convince the judges to repeal a law with which Leptines abolished exemptions from liturgies. He seems to distinguish between two times: one in which the traditional law on *nomothesia* was respected, and another successive time in which politicians found a way to pass laws however they wanted, without following the correct procedures (*pace* MacDowell 1975: 65, 73, Demosthenes is not referring to successive laws and procedures of legislation but to new illegal practices by the politicians; see Rhodes 1984: 56, Canevaro 2013b: 241, 2016). Apparently, in the earlier time, when they kept to the traditional laws, paradoxically, the Athenians did not legislate at all. In fact, these two times are fictitious and vaguely defined, with no precise correlation to Athenian reality. The practices described for both times are rhetorically construed as absolute opposites. On the one hand, there is no evidence that in the time of Demosthenes laws were not passed correctly by the *nomothetai* (cf. Hansen 1978 and 1979). Both Dem. 20 and 24 are speeches against newly enacted laws, and are evidence that the normal checks of the *nomothesia* procedure were still functioning. On the other, the representation of a time in which the Athenians used the existing laws without enacting new ones is also a rhetorical construct, built as the absolute opposite of the present situation. And despite the fact that the Athenians in a past ideal time allegedly did not pass laws, Demosthenes does not blame modern politicians generically for passing laws. He blames them because they 'pass laws whenever they want in any possible way'. They do not respect the correct procedures and the timescale of *nomothesia* s (cf. Canevaro 2013b: 146-7). The result is that they enact laws that contradict previous ones, endangering the overall coherence of the

laws (cf. Dem. 24.139-41 with Canevaro, forthcoming for a similar strategy). Whatever the idealized picture of a past world, what Demosthenes does not mean that Athenians should not legislate. He just means that they should pay more attention to doing it properly, following the correct procedures (cf. Canevaro, forthcoming).

Demosthenes' (and the other orators') approach to the origin and coherence of the laws and to legal change are part of a complex and nuanced legal discourse. The Athenians in the fourth century did not subscribe to a nostalgic view of their laws suspicious of legal change. In fact, they enacted laws regularly and consistently following the correct procedures, and the orators never suggest that recent laws have less validity or authority (cf. Canevaro 2015 and forthcoming for further discussion). The new laws, correctly enacted, were treated as as authoritative as the ancient ones, and believed to be consistent with all the other laws, and with the intent of the original lawgiver. It was the very procedure of *nomothesia*, through which legal change was effected in the fourth century, that was normally singled out as the reason and guarantee of the coherence of the laws. Aeschines (3.37-40) denies that the existence of two laws setting different rules on the same matter is even possible, because there is a procedure specifically in place to eliminate inconsistencies from the system. Likewise, Demosthenes (23.34-6) justifies the rule that, when one enacts a new law, he must first repeal all contradictory laws, with these words: 'Imagine if there should be two laws contradicting each other.... [The Judges] could not vote for either litigant and abide by their oath for their verdict would go against the other law, which was equally valid. To protect you against this, the lawgiver established these rules' (trans. Harris).

In such passages the orators explicitly recognize that legal change happens regularly, is acceptable, and does not endanger the coherence and rationality of the laws, as long as the correct procedures are followed in enacting new laws. The procedures of *nomothesia*, securing the avoidance of contradictions and the repealing of inconsistent norms, were believed to be the main safeguard of the coherence of the laws (cf. Canevaro, forthcoming). This is why the laws of Athens, despite plenty of innovation and stratification, could still be understood in the fourth century as a coherent and rational system characterized by the unitary *ethos* and the unitary intent of the lawgiver Solon. And it is in accordance with this unitary *ethos* and intent, as expressed in the individual laws and in the laws as a whole, that the judges swore in the Judicial Oath to cast their vote. This is why they could appeal to past

interpretations of a statute, to other statutes or to the intent of the lawgiver to clarify the 'open texture' of a law, or to represent more generally the behaviour of a defendant as contrary to the *ethos* expressed by the laws. This is the legal discourse within which Demosthenes argues his cases, and for which his speeches are the most important evidence.

Suggested Reading

Scholarly positions about Athenian law and oratory have long been, and still are, strongly polarised. I take in this chapter, and attempt to advance coherently, a particular interpretative line. The following should give the reader an idea of the variety of positions that have had, and still have, currency in scholarship.

Several scholars have understood the Athenian legal system as concerned not so much with securing justice and enforcing the laws, but rather with reassessing the relative social position of the two litigants. According to these reconstructions, the Athenians paid little attention to the letter of the law. For statements of this view see prminently Osborne (1985), Todd (1993), Christ (1998; cf. also Ober 1989). These views have been a reaction to a continental tradition that saw Athenian judicial oratory as concerned strictly with the enforcement of the letter of the laws, exemplified particularly in Meyer-Laurin (1965), but see also Wolff (1968; both translated in Carawan 2007). Lanni (2006) attempts a middle ground, postulating different standards of relevance in different courts, and therefore different rhetorical discourses. Ultimately, she still sees the normal Attic trial as concerned with providing *ad hoc* judgments rather than enforcing the laws. Other works have stressed instead that ideas of justice and lawfulness were central, but legal arguments were rhetorically articulated not in terms of abidance by, or breach of, specific laws, but rather in terms of general conformity to the spirit of the laws (Johstone 1999; Wohl 2010).

Harris' studies (collected mostly in Harris 2006 and 2013) have argued on the other hand that issues of law abidance or breach of the laws were indeed central to forensic oratory, and that the courts did aim to enforce the rule of law. Thür (2008) has stressed the importance of the preliminary stages of the trial for understanding the shape that legal discourse took in court, and Rubinstein (2000) has dealt with the role of supporting speakers. Carey (1996) is an important study of the way laws were used in forensic oratory, and of their centrality. Canevaro (2013) deals with the authenticity

of the legal texts in the speeches of the orators, and with how legal text were quoted and paraphrased. Rhodes (2004) deals with the issue of relevance in forensic speeches and shows that the litigants normally 'stuck to the point'.

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